

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

|                                 |   |                             |
|---------------------------------|---|-----------------------------|
| ROY M. CALLAHAN,                | ) |                             |
|                                 | ) | No. CV-11-251-JPH           |
| Plaintiff,                      | ) |                             |
|                                 | ) | ORDER GRANTING PLAINTIFF'S  |
| v.                              | ) | MOTION FOR SUMMARY JUDGMENT |
|                                 | ) |                             |
| MICHAEL J. ASTRUE, Commissioner | ) |                             |
| of Social Security,             | ) |                             |
|                                 | ) |                             |
| Defendant.                      | ) |                             |
|                                 | ) |                             |
|                                 | ) |                             |

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BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 16. Attorney Maureen J. Rosette represents plaintiff. Special Assistant United States Attorney David J. Burdett represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. On August 14, 2012, plaintiff filed a reply. ECF No. 18. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** plaintiff's motion for summary judgment, **ECF No. 13.**

**JURISDICTION**

Plaintiff protectively applied for disability insurance benefits (DIB) on July 20, 2006 and on May 28, 2008, alleging disability beginning March 1, 2003 (Tr. 117, 123). The applications were denied initially and on reconsideration (Tr. 74-80, 86-90).

1 At a hearing before Administrative Law Judge (ALJ) Moira  
2 Ausems on October 27, 2009, plaintiff, represented by counsel, and  
3 a vocational expert testified (Tr. 39-70). On March 5, 2010, the  
4 ALJ issued an unfavorable decision (Tr. 16-30). The Appeals  
5 Council denied review on May 20, 2011 (Tr. 1-4). The ALJ's  
6 decision became the final decision of the Commissioner, which is  
7 appealable to the district court pursuant to 42 U.S.C. § 405(g).  
8 Plaintiff filed this action for judicial review on July 1, 2011.  
9 ECF No. 1,4.

#### 10 **STATEMENT OF FACTS**

11 The facts have been presented in the administrative hearing  
12 transcript, the ALJ's decision, and the briefs of the parties.  
13 They are briefly summarized here.

14 Callahan was 31 years year old on his last insured date and  
15 32 on the date of the ALJ's decision (Tr. 29). He earned an AA  
16 degree at a community college in computer technology in 2004 or  
17 2005. He lives with his spouse (Tr. 51, 157, 163, 187, 270).  
18 Callahan has worked as an electronics technician, shipping and  
19 receiving clerk, and cook (Tr. 63-64, 167). He served in the  
20 military from September 1997 to March 2003 (Tr. 307). He alleges  
21 disability due to back pain, nerve damage, panic disorder, and  
22 post-traumatic stress disorder (PTSD)(Tr. 183). The appeal is  
23 limited to mental impairment.

#### 24 **SEQUENTIAL EVALUATION PROCESS**

25 The Social Security Act (the Act) defines disability as the  
26 "inability to engage in any substantial gainful activity by reason  
27 of any medically determinable physical or mental impairment which  
28 can be expected to result in death or which has lasted or can be

1 expected to last for a continuous period of not less than twelve  
2 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
3 provides that a Plaintiff shall be determined to be under a  
4 disability only if any impairments are of such severity that a  
5 plaintiff is not only unable to do previous work but cannot,  
6 considering plaintiff's age, education and work experiences,  
7 engage in any other substantial gainful work which exists in the  
8 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
9 Thus, the definition of disability consists of both medical and  
10 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
11 (9<sup>th</sup> Cir. 2001).

12 The Commissioner has established a five-step sequential  
13 evaluation process for determining whether a person is disabled.  
14 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
15 is engaged in substantial gainful activities. If so, benefits are  
16 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,  
17 the decision maker proceeds to step two, which determines whether  
18 plaintiff has a medically severe impairment or combination of  
19 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

20 If plaintiff does not have a severe impairment or combination  
21 of impairments, the disability claim is denied. If the impairment  
22 is severe, the evaluation proceeds to the third step, which  
23 compares plaintiff's impairment with a number of listed  
24 impairments acknowledged by the Commissioner to be so severe as to  
25 preclude substantial gainful activity. 20 C.F.R. §§  
26 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P,  
27 App. 1. If the impairment meets or equals one of the listed  
28 impairments, plaintiff is conclusively presumed to be disabled.

1 If the impairment is not one conclusively presumed to be  
2 disabling, the evaluation proceeds to the fourth step, which  
3 determines whether the impairment prevents plaintiff from  
4 performing work which was performed in the past. If a plaintiff is  
5 able to perform previous work, that Plaintiff is deemed not  
6 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
7 this step, plaintiff's residual functional capacity (RFC)  
8 assessment is considered. If plaintiff cannot perform this work,  
9 the fifth and final step in the process determines whether  
10 plaintiff is able to perform other work in the national economy in  
11 view of plaintiff's residual functional capacity, age, education  
12 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
13 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

14 The initial burden of proof rests upon plaintiff to establish  
15 a *prima facie* case of entitlement to disability benefits.  
16 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
17 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
18 met once plaintiff establishes that a physical or mental  
19 impairment prevents the performance of previous work. *Hoffman v.*  
20 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
21 shifts, at step five, to the Commissioner to show that (1)  
22 plaintiff can perform other substantial gainful activity and (2) a  
23 "significant number of jobs exist in the national economy" which  
24 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
25 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

#### 26 STANDARD OF REVIEW

27 Congress has provided a limited scope of judicial review of a  
28 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

1 the Commissioner's decision, made through an ALJ, when the  
2 determination is not based on legal error and is supported by  
3 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
4 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The  
5 [Commissioner's] determination that a plaintiff is not disabled  
6 will be upheld if the findings of fact are supported by  
7 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
8 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
9 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
10 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
11 *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989);  
12 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
13 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
14 evidence as a reasonable mind might accept as adequate to support  
15 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
16 (citations omitted). "[S]uch inferences and conclusions as the  
17 [Commissioner] may reasonably draw from the evidence" will also be  
18 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
19 review, the Court considers the record as a whole, not just the  
20 evidence supporting the decision of the Commissioner. *Weetman v.*  
21 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
22 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

23 It is the role of the trier of fact, not this Court, to  
24 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
25 evidence supports more than one rational interpretation, the Court  
26 may not substitute its judgment for that of the Commissioner.  
27 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
28 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial

1 evidence will still be set aside if the proper legal standards  
2 were not applied in weighing the evidence and making the decision.  
3 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
4 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
5 support the administrative findings, or if there is conflicting  
6 evidence that will support a finding of either disability or  
7 nondisability, the finding of the Commissioner is conclusive.  
8 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 9 **ALJ'S FINDINGS**

10 The ALJ found Callahan was insured through December 31, 2008  
11 (Tr. 17, 18). At step one she found he did not engage in  
12 substantial gainful activity after September 8, 2006 (Tr. 18). At  
13 steps two and three, she found Callahan suffers PTSD, dysthymia,  
14 major depressive disorder, general anxiety disorder with reported  
15 panic symptoms, alcohol and cannabis abuse history, lumbar  
16 degenerative disc disease (DDD) with arthrosis and history of  
17 possible ulnar nerve entrapment syndrome, impairments that are  
18 severe but which do not alone or in combination meet or medically  
19 equal a Listed impairment (Tr. 19). The ALJ found plaintiff less  
20 than fully credible and assessed an RFC for a range of light work  
21 (Tr. 20-21). At step four, relying on a VE's testimony, ALJ  
22 Mausems found Callahan is unable to perform past work (Tr. 28). At  
23 step five, again relying on the VE, the ALJ found Callahan can  
24 perform other jobs, such as assembler and production checker (Tr.  
25 30). The ALJ found plaintiff was not disabled as defined by the  
26 Social Security Act during the relevant period (Id).

#### 27 **ISSUES**

28 Callahan alleges the ALJ erred when she weighed the evidence

1 of mental impairment and assessed his residual functional  
2 capacity. ECF No. 14 at 9-20. The Commissioner responds that the  
3 ALJ's decision is supported by substantial evidence and free of  
4 legal error. He asks the Court to affirm. ECF No. 17 at 2.

#### 5 DISCUSSION

##### 6 A. Weighing medical evidence

7 In social security proceedings, the claimant must prove the  
8 existence of a physical or mental impairment by providing medical  
9 evidence consisting of signs, symptoms, and laboratory findings;  
10 the claimant's own statement of symptoms alone will not suffice.  
11 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
12 on the basis of a medically determinable impairment which can be  
13 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
14 medical evidence of an underlying impairment has been shown,  
15 medical findings are not required to support the alleged severity  
16 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.  
17 1991).

18 A treating physician's opinion is given special weight  
19 because of familiarity with the claimant and the claimant's  
20 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
21 1989). However, the treating physician's opinion is not  
22 "necessarily conclusive as to either a physical condition or the  
23 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
24 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
25 treating physician than an examining physician. *Lester v. Chater*,  
26 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
27 given to the opinions of treating and examining physicians than to  
28 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592

(9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the ALJ may reject an opinion by stating specific, legitimate reasons that are supported by substantial evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995).

In addition to the testimony of a nonexamining medical advisor, the ALJ must have other evidence to support a decision to reject the opinion of a treating physician, such as laboratory test results, contrary reports from examining physicians, and testimony from the claimant that was inconsistent with the treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747, 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup> Cir. 1995).

#### **B. Mental impairment**

Callahan alleges the ALJ failed to properly weigh the opinions of treating, examining and reviewing sources with respect to his mental impairments and limitations. ECF No. 14 at 9-20. First, he alleges the ALJ failed to properly credit the opinions of treating and examining sources at the Department of Veterans' Affairs.<sup>1</sup> This issue is dispositive.

#### *VA opinions and disability rating*

Callahan alleges the ALJ failed to properly credit the 2004 opinion of VA examiner Philip Plattner, M.D. ECF No. 14 at 9-10.

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<sup>1</sup>After Callahan served in the military from September 4, 1997 to March 28, 2003, he was honorably discharged (Tr. 307).



1 Dr. Plattner opined Callahan was incapable of work at that time  
2 (Tr. 315). On December 23, 2005, the VA increased Callahan's  
3 assessed PTSD with depression from a 30% rating to a rating of 70  
4 percent disability, effective March 29, 2003. He was also entitled  
5 to individual unemployability effective March 29, 2003. ECF No. 14  
6 at 12, Tr. 516-18.

7 More than two years later, on February 19, 2008, VA doctor  
8 Jeffrey S. Schack, M.D., opined Callahan suffered from PTSD by  
9 history, possibly now irritable/insomnia related to stopping  
10 drinking two weeks earlier [February 5, 2008] and alcohol abuse.  
11 ECF No. 14 at 10, citing Tr. 388-90.

12 A month later, in March 2008, Callahan reported panic  
13 attacks, intrusive PTSD symptoms, nightmares with disrupted sleep  
14 and recent homicidal/suicidal ideation. Callahan had been out of  
15 treatment for several months because, he said, the groups made him  
16 so angry he did not want to come back. ECF No. 14 at 10, citing  
17 Tr. 385-387.

18 As noted the VA increased Callahan's disability rating due to  
19 PTSD to 70%, awarded December 1, 2006 and paid at 100% due to  
20 unemployability (Tr. 144, 147). Ordinarily an ALJ must give great  
21 weight to a VA determination of disability. A decision to reject  
22 such an opinion must be based on persuasive reasons. *McCartey v.*  
23 *Massanari*, 298 F.3d 1072, 1076 (9<sup>th</sup> Cir. 2002). Because the VA and  
24 SSA criteria for determining disability are not identical, the ALJ  
25 may give less weight to a VA disability rating if he or she gives  
26 persuasive, specific, valid reasons for doing so that are  
27 supported by the record. *Id.* at 1076. The Commissioner opines the  
28 higher VA disability rating predates the relevant dates in this

1 case, September 9, 2006 to December 31, 2008. ECF No. 17 at 13-14.

2 The ALJ rejected the VA rating for the following reasons: (1)  
3 the complete record does not contain evidence that supports total  
4 disability due to PTSD or any other condition, but does show  
5 improvement and control with treatment after the VA issued its  
6 rating (2) VA records reveal infrequent treatment with lengthy  
7 unexplained gaps, and many instances of Callahan failing to  
8 appear or cancel scheduled appointments (3) there is no indication  
9 the VA considered Callahan's history of substance abuse when they  
10 rated disability and (4) at about the same time the VA issued its  
11 disability rating, Callahan completed an AA degree in computer  
12 technology at a community college (Tr. 22, 28). The ALJ notes this  
13 is an activity "that is not suggestive of an individual  
14 experiencing disabling PTSD symptoms or disabling limitations from  
15 any other impairment" (Tr. 28).

16 With respect to the ALJ's first reason, "improvement and  
17 control" with treatment after the VA issued its disability rating,  
18 the record does not support the assertion. At best, the record  
19 shows sporadic control of PTSD symptoms. See Tr. 54: Callahan  
20 testified in 2009 depression and anxiety are worse since 2006; Tr.  
21 385: John Edwards, M.D., at the VA notes Callahan says he is  
22 depressed all the time; he is dirty, depressed, angry; at the same  
23 time Callahan indicates he is calmer and less depressed the last  
24 two weeks since resuming medication, March 2008; and Tr. 402:  
25 examiner John McRae, Ph.D., observes "depression manifest during  
26 interview," August 2008.

27 The ALJ's second reason is that the VA record shows  
28 significant gaps in Callahan's mental health treatment. An

1 unexplained, or inadequately explained, failure to seek treatment  
2 or follow a prescribed course of treatment can cast doubt on the  
3 sincerity of a claimant's subjective complaints. *Fair v. Bowen*,  
4 885 F.2d 597, 603 (9<sup>th</sup> Cir. 2001). However, in the case of a  
5 mental health disorder, failure to seek treatment may be an  
6 unfortunate result of the disorder. See *Van Nguyen v. Chater*, 100  
7 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996). While the VA did not clearly  
8 separate out the effects of drugs and alcohol on Callahan's  
9 functioning, as the ALJ observes, the record as a whole contains  
10 very few references to substance abuse, including the records from  
11 the VA. See e.g., Tr. 255 (2004), 271, 274, 328 (2005), 368  
12 (2003), 385, 390, 402 (2008).

13 The ALJ also relied on Callahan's ability to complete an AA  
14 degree in computer technology at about the same time the VA issued  
15 its rating (Tr. 22, 28). While the court agrees with the ALJ that  
16 this certainly shows some functional ability, based on the largely  
17 uncontroverted evidence of all of the treating, examining and  
18 reviewing sources, the court finds the ALJ's reasons for the  
19 rejecting the VA's disability rating are not persuasive, valid and  
20 supported by the record as a whole.

21 The court's resolution of this issue requires reversal.  
22 Accordingly, the court considers the record to determine whether  
23 to remand for further proceedings or calculation of benefits.

#### 24 *Examining psychologist*

25 As noted, Dr. McRae examined Callahan in August 2008.  
26 Plaintiff alleges the ALJ failed to properly credit McRae's  
27 opinion. ECF No. 14 at 11, citing Tr. 401-03. The Commissioner  
28 answers that the ALJ gave specific and legitimate reasons for

1 rejecting Dr. McRae's contradicted opinion: (1) Dr. McRae did not  
2 discuss Callahan's limitations; instead, he deferred to the  
3 treating psychologist's opinion; (2) the majority of the report  
4 consists of Callahan's subjective complaints and (3) the mental  
5 status examination results were relatively benign, as the ALJ  
6 observes (Tr. 22, 27). The Commissioner asserts these reasons  
7 justify the ALJ's rejection of Dr. McRae's opinion. ECF No. 17 at  
8 7-9, Tr. 402-03.

9 Dr. McRae deferred to Callahan's treatment providers.

10 He also observed "I note as the evaluation goes on that he  
11 appears flat, psychomotor slow, self focused and focused on his  
12 psychiatric symptoms ... His affect is very flat ... His  
13 depression is manifest during the interview while his anxiety is  
14 not so visibly evident." (Tr. 402). Contrary to the ALJ's reason,  
15 Dr. McRae's observations are not subjective complaints.

16 The ALJ's reasons are not supported by the record. An opinion  
17 of disability premised to a large extent on the claimant's own  
18 accounts of his or her symptoms and limitations may be  
19 disregarded, once those complaints have themselves been properly  
20 discounted. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir.  
21 1995). However, as noted, Dr. McRae's opinion contains several  
22 observations, rather than statements by plaintiff, that are  
23 consistent with the bulk of the record. Dr. McRae diagnosed major  
24 depression, recurrent, an anxiety disorder NOS (PTSD, panic and  
25 general anxiety disorders) and alcohol abuse. These too are  
26 largely consistent with the record.

27 *Dennis Pollack, Ph.D.*

28 Dr. Pollack evaluated Callahan on March 3, 2009, and assessed

1 moderate and marked limitations (Tr. 440). Plaintiff alleges the  
2 ALJ should have credited the opinion as that of a treating source  
3 because Dr. Pollack began treating Callahan in "approximately  
4 February 2008," about a year prior to his March 3, 2009  
5 evaluation. ECF No. 14 at 12-13, 15-17, 20.

6 The Commissioner answers that the ALJ properly rejected Dr.  
7 Pollack's contradicted March 2009 opinion because no treatment  
8 notes were provided to support the opinion, the narrative report  
9 is inconsistent with assessed marked limitations and Dr. Pollack  
10 failed to indicate in the report that he was treating Callahan.  
11 ECF No. 17 at 9-12.

12 The Commissioner is correct that Dr. Pollack failed to  
13 provide treatment notes. Dr. Pollack states on the first page "Mr.  
14 Callahan was self referred for treatment of Post-Traumatic Stress  
15 Syndrome and depression" (Tr. 434). Thus, Pollack states Callahan  
16 came to him for treatment, contrary to the Commissioner's  
17 assertion.

18 When evaluating conflicting opinions, the ALJ need not accept  
19 the opinion of a doctor if that opinion is brief, conclusory, and  
20 inadequately supported by clinical findings. *Tonapetyan v. Halter*,  
21 242 F.3d at 1149. The ALJ is correct that Dr. Pollack failed to  
22 provide any treatment notes. He did, however, conduct testing and  
23 interpret the results. As a result the Commissioner is inaccurate  
24 when he characterizes it as brief, conclusory or inadequately  
25 supported by clinical findings.

26 It appears Dr. Pollack treated Callahan for over a year.<sup>2</sup> He

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27 <sup>2</sup>In October 2009 Callahan testified he had been seeing Dr.  
28 Pollack weekly for a year and a half (Tr. 61). Callahan stated  
in a report he first saw Dr. Pollack in February 2008 (Tr. 186).  
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1 assessed as "markedly limited" Callahan's ability to complete a  
2 normal workday and workweek without interruptions from  
3 psychologically based symptoms, and to perform activities within a  
4 schedule, maintain regular attendance and be punctual within  
5 customary tolerances (Tr. 440). The ALJ rejected these limitations  
6 when she assessed Callahan's RFC.

7       Seven months earlier, agency reviewing psychologist Edward  
8 Beaty, Ph.D., opined Callahan's ability to complete a normal  
9 workday was moderately limited. He opined, as Pollack later did,  
10 that Callahan's ability to maintain concentration for extended  
11 periods was moderately limited (Tr. 426-27, 440).

12       The ALJ also rejected Dr. Pollack's report as internally  
13 inconsistent. She opined the objective evidence in the narrative  
14 report does not support the assessed limitations (Tr. 28). The ALJ  
15 notes several test results showed no more than mild limitations in  
16 concentration, persistence, pace and social functioning, yet  
17 Pollack assessed as moderately limited Callahan's ability to  
18 maintain attention and concentration for extended periods, and he  
19 assessed three other marked limitations (Tr. 28, 440). While the  
20 ALJ may properly reject a treating doctor's internally  
21 inconsistent opinion, *Young v. Heckler*, 803 F.2d 963, 967-68 (9<sup>th</sup>  
22 Cir. 1986), such is not the case here. The results of a few tests  
23 administered by Dr. Pollack does not change the striking fact that  
24 Pollack's and Beaty's assessed limitations are quite similar.

25       Plaintiff alleges the ALJ should have adopted Dr. Beaty's  
26 opinion that "Callahan's sustained concentration and  
27 pace would be periodically disrupted by his depression and  
28 anxiety." And, Callahan alleges, Dr. Beaty's assessed "six

1 moderate checkbox limitations" should have been included in the  
2 ALJ's hypothetical. ECF No. 14 at 11, 18-19, Tr. 412-29, 426-28.

3 The Commissioner answers that the ALJ limited Callahan to  
4 performing simple and repetitive tasks with no more than minimal  
5 contact with the general public and no work requiring  
6 collaborative efforts as part of a team, limitations that  
7 adequately account for Dr. Beaty's restrictions. Second, the  
8 Commissioner points out that the section of Dr. Beaty's form  
9 containing the checkbox limitations is a worksheet, not the RFC  
10 assessment. ECF No. 17 at 12-13, Tr. 20, 26-27, 428.

11 The Commissioner is partially correct. The checkbox  
12 limitations do not comprise the RFC assessment.

13 An ALJ's assessment of a claimant adequately captures  
14 restrictions related to concentration, persistence, or pace where  
15 the assessment is consistent with restrictions identified in the  
16 medical testimony. *Stubbs-Danielson*, 539 F.3d at 1174, citing  
17 *Howard v. Massanari*, 255 F.3d 577, 582 (8<sup>th</sup> Cir. 2001)(consistent  
18 with state psychologist's opinion, hypothetical including ability  
19 to perform "simple, routine, repetitive tasks" adequately captured  
20 claimant's deficiencies in concentration, persistence or pace);  
21 *Smith v. Halter*, 307 F.3d 377, 379 (6<sup>th</sup> Cir. 2001).

22 In this case, however, the medical testimony is consistent  
23 with more limited functioning. Dr. Pollack, a treating  
24 psychologist, assessed a GAF of 55 in 2009, well after Dr. Beaty's  
25 record review, indicative of moderate symptoms or difficulties in  
26 social, occupational or school functioning. Treating sources at  
27 the VA have rated Callahan's GAF at 40-45 (e.g., November 2004,  
28 Tr. 258). They indicate he "clearly is impaired by his depression

1 and anxiety" (September 2005, Tr. 271). A GAF of 47 was assessed  
2 on July 19, 2006, noted at Tr. 385, and of 50 on January 12, 2009  
3 (Tr. 495). All indicate problems ranging from major impairment in  
4 several areas to serious impairment in one area.

5 Where the Commissioner fails to provide adequate reasons for  
6 rejecting the opinion of a treating or examining physician, we  
7 credit that opinion as a matter of law. **Lester**, 81 F.3d at 834  
8 (internal citation omitted). Similarly, if the ALJ fails to give  
9 persuasive reasons for rejecting a VA disability rating, the court  
10 generally credits the opinion. See *McCartey v. Massanari*, 298 F.3d  
11 1072, 1076-77 (9<sup>th</sup> Cir. 2002)(discussing standards for remand for  
12 additional evidence versus for an award of benefits). If it is  
13 clear from the administrative record that the ALJ would be  
14 required to find the claimant disabled on remand, then the court  
15 typically remands for a calculation of benefits. *Orn v. Astrue*,  
16 495 F.3d 625, 640 (9<sup>th</sup> Cir. 2007).

17 It is clear from the record here that if the ALJ properly  
18 credited the evidence Callahan would be found disabled.

#### 19 CONCLUSION

20 Having reviewed the record and the ALJ's conclusions, this  
21 court finds that the ALJ's decision is not free of legal error and  
22 supported by substantial evidence.

#### 23 IT IS ORDERED:

24 1. Plaintiff's motion for summary judgment, **ECF No. 13**, is  
25 **GRANTED. The case is reversed and remanded for a calculation of**  
26 **benefits.**

27 2. Defendant's motion for summary judgment, **ECF No. 16**, is  
28 **DENIED.**



1 The District Court Executive is directed to file this Order,  
2 provide copies to counsel, enter judgment in favor of plaintiff,  
3 and **CLOSE** the file.

4 DATED this 2nd day of January, 2013.

5 s/ James P. Hutton  
6 JAMES P. HUTTON  
7 UNITED STATES MAGISTRATE JUDGE  
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